91-1627

NO. 91- 1441

CASE NO.:

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
JAN 13 1992

HENRY AND DONNA MITCHELL, AS NEXT FRIEND FOR WILLIAM DEVON Mitchell, A MINOR

PETITIONERS

VS.

METROPOLITAN LIFE INSURANCE CO.

RESPONDENT

PEETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HENRY MITCHELL
P.O.BOX 19172
FORT WORTH, TEXAS 76119
(817) 536-3227

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QUESTIONS PRESENTED FOR REVIEW

Whether the lower Court erred in determining the Default judgment entered by the Court's Clerk, Ms. Nancy Doherty.

Whether the lower Court erred in determining the addendum to case, filed with the Amended Complaint to add defendants.

Whether the lower Court erred in determining the motion for stay, before MetLife filed motion(12(e)) on 8/10/90.

Whether the lower Court erred in determining that payments have been made as to the allage agreement and that payments are being made and or paid to plaintiff's..

Whether the lower Court erred in determining the AFFIDAVIT made in"bad faith" shoule be estoppel from alleging that agreement was made, for payments have not been made and no such agreement was made.

Whether the lower Court erred in determining the " Certificate of Conference" as to agree or disagree does it change the date of filing original response to Complaint and Summons.

LIST OF ALL PARTIES

I hereby certify that the following comprise all interested persons known to the petitioners:

Henry Mitchell, Petitioners

Donna Mitchell

William Devon Mitchell

Louis Mitchell, Jr.

Metropolitan Life Insurance Co. Respondent

Chapman & Reese P.C.

Ann Reed

Carlyle H. Chapman, Jr.

Henry Mitchell

Henry Mitchell-pro-se

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THE STATUTORY PROVISION BELEIVED TO CONFER ON THIS COURT JURISDICTION TO REVIEW THE CASE

ARTICLE 111. SECTION 1. of the united states shall be vested in one Supreme Court to fully adjudicate its jurisdiction over the parties and subject matter. The Supreme Powers, the highest authorities, all other powers it it being inferior thereto.6/25/48 STAT. 869.28 U.S.C.A. ¦ 1. and listed Title.

TITLE 28 U.S.C.A. ¦ 1251

TITLE 28 U.S.C.A. ¦ 1253

TITLE 28 U.S.C.A. ¦ 1254

TITLE 28 U.S.C.A. ¦ 2101 (a)(f)

STATUES INVOLVED IN THE CASE

DEFAULT:

By its derivation, a failure MEADOWS V. CONTINENTIAL ASSUR. CO. C.C.A. TEX. 89.F. 2d. 256/ An omission of that which ought to be done. TOWN OF MILTON V. BRUSO 1111 Vt. 82.10 A. 2d. 203,205. To observe a promise or discharge an obligationBRADBURY V. THOMAS, 135 CAL.App. 435.27. F. 2d. 402. The term also embraces the idea of dishonesty, and wrongful act. GRECO V. S.S. KRESGE CO. 277 N.Y. 26.12. N.E. 2d.557,562.or an act of omission discreditable to one's profession.HILKERT V. CANNING,58 ARIZ. 290,119, F. 2d. 233.236.

Under Rules of Civil procedure, when a party against whom a judgment for affirmative relief is sought has failed to plead (answer) or otherwise defend, he is in default and judgment by default may be entered either by the Clerk or the Court.Fed.R.Civ.P. Rule 55(a)(1).

The Court Clerk after checking to see if the adverse party had answered the Complaint and Summons concluded that default judgment should be entered according to the Rule that

STATEMENT OF THE CASE

This is an Appeal from a final order signed by the Fifth Circuit Court of Appeals on October 28,1991 affirming the decision of the lower Court, District Court in determining the claim that MetLife was not in default and was correct in the total dismissal of this action, although MetLife did not filed or defend the Complaint within the rwquired time prescribed by law..

FACTS

On 6/27/90, Complaint and Summons issued and the required fees paid. 6/27/90 Complaint and Summons issued for MetLife.

)n 8/7/90, Plaintiff's request Clerk for entry of Default against MetLife. On 8/7/90, the Clerk entered Default judgment against MetLife. On 8/7/90, Plaintiff's Affidavit in support of Default judgment.

On 8/8/90 Plaintiff's motion for stay to enforce judgment, for MetLife had not defended or answered the Complaint and Summons.

On 8/10/90,MetLife filed with the Court

their motion under Rule 12(e) and allege that Plaintiff's agreed to the filing of the motion under said Rule. and further stated that it appears that payments have been made or being made pursuant to agreements entered with or in behalf of the Plaintiff's by way of Affidavit that the lower beleived was a true statement for no payments was ever made to plaintiff's pursuant to some allege agreement and that the defendant, MetLife has paid or continues to pay any sum due Plaintiff's. as the basis of the agreements entered with or for the benefit of Plaintiff's.

Plaintiff's contend that the Defendant, MetLife deceived the Court by making false statement and the filing of the Affidavit in " bad faith". The defendant should be esestopped from alleging that payments was and have been made pursuant to said allege agreement. Plaintiff's contend that the Default judgment was entered in this cause because the defendant did not defend the Complaint and Summons within the required time prescribed by law. for it was not en-

tered by mistake, inadvertence and/or surprise for the defendant relied on this bias and prejudice Court to reverse the decision of the Clerk for the Affidavit filed in bad faith and the Court error's as to the filing of the motion for stay that was denied alleging that the motion did not cite grounds for stay,and the defendant did not request the Court to set aside the motion for stay file on 8/8/90, for the error's was made to take advantage of the pro-se litigant by alleging that the stays(two) was filed against the Mangelsdorfs Company in which the Court made error's for the stays was filed against MetLife and Texas Medical Liability Trust for failure to bring forth their answers within the require time prescribed allowed by law.

Plaintiff's contend that the motions(all) was never address by this Court, for only the motions filed by the defendant was address by the Court.

Plaintiff's contend that the Court Clerk's conduct as to the filing of the Complaint on 6/29/90, and addendum to case to add defendants must be by way of an amended Complaint which led to the denial of default judgemnt and this

was done intentional to deceive the pro-se litigant. and the filing of papers and documents was not filed or entered chronologica in the Civil docket sheet. Rule 79(a).

The Court Clerk's made an error as to the filing of action against MetLife which was on 6/27/90, and not as alleged by the Clerk's on 6/29/90.

The defendant, MetLife should be estoppel from claiming a right or to rely on such condu duct, Affidavit made in " BAD FAITH" GRAHAM V. ASBURY 112, ARIZ. 184,540 P.2d. 656.658.An inconsistent position attitude or cause of co duct may not be adopted to lose or injury of another. BRAND V. FARMERS MUT. PROTECTIVE ASS' OF TEXAS CIV. App. 95.S.W. 2d. 994.997.

The misleading and false Affidavit(paragra 1v.) of the Affidavit that payments have been made or are being made pursuant to some agreement entered with or in behalf of Plaintiff's herein is false and the Court has sanctioned the " BAD AFFIDAVIT" for the benefit of the adverse party, which led to denial of due process and a miscarriage of justice.

BEST AVAILAB

REFERENCE TO THE OFFICIAL REPORT

AND OPINION DELIVERED IN THE CASE

On 6/29.90 addendum to case was filed along with the Complaint and Sunnons for the Court to take notice that the above names are to be added to the same cause number that was filed on 6/27/90.

The addendum to case, with the Amended Complaint as defined by "Black's Law Dictionary" to change; or modify, for the better, To alter by modification,deletion, or addition Plaintiff's filed the Complaint (addendum) to add defendants to the same cause number.

The lower Courts did not consider the addendum to case.

The Courts alleges that the Amended Complaint had the effect of causing the action to be dismissed as to MetLife.

Plaintiff's contends that Fed.R.Civ.P. Rule 15(c) provide two averments as to the relation back of Amendments, an Amendments changing the party against whom a Claim is asserted relates back if the foregoing provision is satisfied (1) has received such

E COPY

notice of the institution of the action that the party will not be prejudice in maintaining his defense on the merits, and (2) Knew or should have known that,the action would have been brought against the party.

Plaintiff's contend that the Amended Complaint was (two) days after the Complaint filed against MetLife and the parties to this action had know knowledge and received know such notice as to causing the amended Complaint to relate back causing MetLife to be deleted from this action.

Plaintiff's, further contend that Fed.R.Ci P.Rule 17(a) would provide that no action sha be dismisses on the grounds that it is not pr secuted in the name of the real party.

Plaintiff's contend that on 8/8/90 A motion for stay was filed pursuant to Rule 62, to enforce judgment, to freeze all proceedings at this particular point. The Court denied the stay on 11/5/90, alleging that the stay did not set forth grounds for a stay. Plaintiff's contend that the lower Court made an error as to the stay, for the grounds was set forth as to stop all

BEST AVAILA

proceedings at this point to enforce to enforce judgment, for MetLife did not bring forth their answers within the required time prescribe by law.

The Court alleges that two motions was filed against the Mangelsdorfd Company for a stay, which is an error, for the stays was filed against MetLife and Texa Medicial Liability Trust to enforce judgment.

Plaintiff's contend that the lower Court made an error as to the the allage agreement made between the party, for no such agreement ever took place and MetLife did not pay plaintiff's any money per some allege agreement.

Plaintiff's contend that the Certificate of Conference as allege by the lower Court does not alter time in which one must bring forth his/her answers or lose one right to bring it.

Plaintiff's contend that MetLife did not respond to the stay filed on 8/8/90, to have the stay set aside.

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CERTIFICATE OF MAILING SERVICE

I do hereby certify that this is a true and correct copy of the enclosed instrument and that said instrument has been mail to all persons or entities having an interest in the outcome of this Writ of Certiorari on this the 18th day of March, 1991.

Plaintiff's	Defendants.
Henry Mitchell	Carlyle H.Chapman,Jr.
Donna Mitchell	Ms. Ann Reed
louis Mitchell,Jr.	Metropolitan LifeCo.

Henry Mitchell

Henry Mitchell-pro-Se

(3)

DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The petitioners respectfully request that this Court grant a Writ of Certiorari in this case in order to correct the error's made by the lower Courts.

On June 27,1990, Complaint and Summons was issue to MetLife. MetLife was serve on July 12, 1990 via Certified mail, return receipt requested P. 336 604 415.

On August 7, 1990, Default Judgment was entered by the Court Clerk,(Nancy Doherty) after concluding that the defendant, MetLife had not defended the Complaint. The Court Clerk checked incoming mail, computers and other documents to see if MetLife had indeed answered the Complaint pursuant to said Rule. Upon finding that record of any type by MetLife as to the Complaint had not not been filed, the Court entered default pursuant to Rule 55(a)(1).

On August 8,1990, Plaintiff's filed their motion pursuant to Rule 62, Motion for Stay to enforce judgment and set forth grounds for stay.

On August 10, 1990, the defendant, MetLife defended the Complaint by filing a MOTION UNDER Rule 12(e) for a more definite statement.

Plaintiff's contend that MetLife did not filed their 12(e) motion within the required time prescribe by law and is in default.

On June 29, 1990, (an addendum) to add defendants along with Complaint and Summons was issued to Texas Medical liability Trust and The Mangelsdorfs Company.

The lower Court (District Court) allege that the filing of the Complaint cause the dismissal as to MetLife because MetLife was not listed on the facing of the Complain and pursuant to Rule 15.

Plaintiff's contend that Rule 15(c) and Rule 17, contradict the Rule allege by said lower Court.

Plaintiff's contend that the Lower Court (fifth Circuit) alleges that the " Certificate of Conference" stating that the plaintiff's had previously agreed

to the filing of the motion for a more definite statement.

The defendant, MetLife claims that they have a meritorious defense to the cause of action alleged by plaintiff's, as it appears that payments have been made or are being made pursuant to agreements entered with or in behalf of plaintiff's herein.

Plaintiff's contend that this Affidavit was filed in bad faith, for no payments ever received from such agreement and no such agreement to the 12(e) motion was ever made.

Plaintiff's respectfully request that this Court grant the Writ of Certiorari for the defendant, MetLife has misled both Courts by filing an Affidavit in bad faith.

Plaintiff's respectfully request that this Court have MetLife to bring forth the name of person(s) who received such payments pursuant to said allege agreement.

Plaintiff's respectfully request that this Court determined whether the Affidavit was filed in bad faith as to the defendant has paid or continues to pay any sum due the plaintiff's as the basis of the agreements ...

entered with or for the benefit of plaintiff's Further still,the defendant shows that the Plaintiff's and the Affidavit prejudice this cause of action by the Courts granting the dismissal of action. The rights and privileges affected by the filing of this bad Affidavit filed in bad faith and plaintiff's harm has been occasioned by the misconduct of the defendant herein.

If this Court (Supreme Court) agree to the meritorious defense as alleged by the defendan Plaintiff's are entitled to recover the sum allege to have been paid pursuant to the alleg agreement.

Plaintiff's respectfully request that this Court have MetLife produce documents as to payments have been made or are being made pursuant to said allege agreement entered with or in behalf of plaintiff's, for the lower Courts has sanctioned this Affidavit that was filed in bad faith.

This Court should grant the Writ of Certiorari on grounds that the Courts have made error's as to the truth of the matter in the above-reference cause.

BEST AVAIL

APPENDIX

NO. 1. Complaint filed against MetLife on June 27,1990.

NO. 2. Receipt for Certified Mail, Re ceived by MetLife on July 12,1990.

NO. 3. Addendum to Case, filed on June 29,1990.(to add defendants).

NO. 4. Complaint (amended) filed on Nune 29, 1990. against TMLT and Mangelsdorf Company.

NO. 5. Clerk entry of default signed on August 7,1990.

NO. 6. Plaintiff's petition for stay filed on August 8,1990.

NO. 7. AMENDED ORDER ON MOTION FOR STAY.

NO. 8. Defendant motion under Rule 12(e)

NO. 9. Defendant motion to rescind 8/13/90

NO..10. Affidavit filed in "BAD FAITH"

NO.11. THE FIFTH CIRCUIT COURT ORDER.

NO.12. Petition for rehearing.filed on 11/21/91.

NO. 13. MANDATE RECALLED AND STAYED. 12/20/91/

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORHT, DIVISION

HENRY AND DONNA MITCHELL,
INDIVIDUALLY,AND AS NEXT
FRIEND FOR WILLIAM DEVON
MITCHELL, A MINOR.

VS.

THE MANGELSDORF COMPANY &
TEXAS MEDICAL LIABILITY
TRUST.

CASE NO.

CA 4-90-472-

ADDENDUM TO CASE

TO: THE HONORABLE COURT:

COME NOW, HENRY AND DONNA MITCHELL,AN AS NEXT FRIEND FOR WILLIAM DEVON MITCHELL, A MINOR ADD THE ABOVE NAMES TO THE ABOVE_ CAPTIONED CAUSE.

Please take notice, that the above names are to be added to the above captioned cause that was filed on june 27,1990.In the United States District Court.

SINCERELY,

Henry Mitchell
HENRY MITCHELL-pro-

Louis Mitchell Jr
Louis Mitchell,Jr.

(1)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH, DIVISION

HENRY AND DONNA MITCHELL, ()
INDIVIDUALLY, AND AS NEXT
FRIEND FOR WILLIAM DEVON ()
MITCHELL, A MINOR.

PLAINTIFF'S

VS.

CASE NO.

THE MANGELSDORF CO. ()

TEXAS MEDICAL LIABILITY
TRUST. () CA-4-472-E

Amended COMPLAINT

Plaintiff's, FOR HIS COMPLAINT ALLEGES:

Plaintiff's, Henry and Donna Mitchell,Indiv. and as next friend for William Devon Mitchell, a minor. are all resident of Tarrant County, Texas.

(1)

Defendant's, the Mangelsdorf Compamy are incorporated and the principle place of business is in Dallas, County, Texas. Defendant, Texas Medical Liability Trust, are Incorporated and the principle place

(2)

place of business is in Austin Travis,Texas.

(2)

JURISDICTION

The United States District Court has jurisdiction on the parties to this action since the occurrances, and the alleged actions occurred in the Northern District of Texas.

The defendant, The Mangelsdorf Company, conspired with Texas Meical Liability Trust along with with Metropolitan Life Ins. Co. to defraud William Devon Mitchell, a minor out of **TWO HUNDRED & sixty seven thousand four hundred hundred & SEVEN TY SIX DOLLARS that** was to have been paid to the minor child, and that the Court appointed ad-litem were to locate an Insurance Company to invest said dollars.

(5)

The alleged Company's conspired with each other to pay 4% percent interest on said dollars, to lined individually pockets and or to defraud the minor child out of the best annuity avaliable in the State of Texas.

(6)

The allaged Company's conspired with one another to transfer dollars (monthly(to the Metropolitan Life Ins. Co. to send monthly

to Willaim Devon Mitchell, a minor.

(7)

The alleged Company's conspired with one another to be the owner of said policy and are the owners jointly. The Mangelsdorf Co. are certified in the State of Texas to write an annuity without the assistance of another insurance Company. The Metropolitan Life Ins. Co. are certified in the State of Texas to write an annuity policy without the help of another Company.

(8)

As a direct and proximate result of the alleged actions against the defendants who conspired to defraud William Devon Mitchell,a minor out of the agreed upon structured annuity an as co-conspirators in constructing of the annuity, The authenticity of the policy are questionable.

WHEREFORE, Plaintiff's, pray for judgment against the defendants in the amount of twenty million dollars($ 20.000.000.00) for the Civil Rifgts violations of William Devon Mitchell, a minor, Court cost, and other interest to the fullest extent allowed by law, and such other

and further relief as the Court may deem just or equitable. HEREBY DEMAND A JURY TRIAL

DATE 6/29/90

Henry Mitchell

Henry Mitchell-pro-se

Louis Mitchell

Louis Mitchell-pro-se

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH, DIVISION

HENRY AND DONNA MITCHELL ()
INDIVIDUALLY, AND AS NEXT
FRIEND FOR WILLIAM DEVON ()
MITCHELL, A MINOR.
VS. ()
METROPOLITAN LIFE INS.CO.()

CLERK'S RNTRY OF DEFAULT

TO" THE HONORABLE JUDGE OF SAID COURT:

Plaintiff's, Henry and Donna Mitchell, Individually, and as next friend for William Devon Mitchell, A minor and as Clerk's of Court enter a default judgment against the defendant, Metropolitan Life Ins. Co., for failure to give his answers to a Summons dated June 27th, 1990.

_____

Clerk of Court

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH, DIVISION

HENRY AND DONNA MITCHELL, ()
INDIVIDUALLY, AND AS NEXT
FRIEND FOR WILLIAM DEVON ()
MITCHELL, A MINOR
VS. ()
METROPOLITAN LIFE INS.CO.
TEXAS MEDICAL LIABILITY
TRUST ()

PLAINTIFF'S PETITION FOR STAY

AND BRIEF

TO: THE HONORABLE JUDGE OF SAID COURT:

Henry and Donna Mitchell,makes his their petition for stay in the above- captioned cause and in support thereof would respectfully, show the Court as follows:

(1)

Plaintiff's, as a matter of courtsey would have granted the defendant, additional time to give his answers to the Summons, if it had been requested by the defendant, The Court alters those peroids of time, unless a fifferent time is fixed by the Court.Rule 12(a).

(4)

Plaintiff's alleged that the defendant, Metropolitan Life Ins. Co., violated the statue of limitations; which is a legislative enactment, or law, establishing the amount of time within which one must bring forth his/her answers or lose one's rights to bring it.

Based on the above, plaintiff's request that that the petition for stay be granted. Plaintiff's,prays general relief.

Respectfully Submitted,

Henry Mitchell

Henry Mitchell-pro-se

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORHT, DIVISION

HENRY AND DONNA MITCHELL, INDIVIDUALLY, AND A NEXT FRIEND FOR WILLIAM DEVON MITCHELL, A MINOR

PLAINTIFF'S

VS.

METROPOLITAN LIFE INS. CO.

CIVIL ACTION NO.

CA 4-90-472-E

DEFENDAT'S MOTION TO RESCIND AND SET ASIDE CLERK'S ENTRY OF DFAULT AND BRIEF IN SUPPORT

COME NOW DEFENDANT, Metropolitan Life Ins. Co. (" Metropolitan") and files this, its motion to rescind and set aside Clerk's Entry of default in the captioned matter, and for cause would respectfully show as follows:

1

This cause was filed on June 27, 1990 in the United States District Court for the Northern District of Texas, Fort Worth Division. The complaint filed by Plaintiffs herein was signed by Henry Mitchell, pro se, and Louis Mitchell, Jr.,

representative.

The complaint was served upon Metropolitan on July 12, 1990, and Metropolitan's answer was, therefore, due on August 1, 1990. On July 30, 1990, counsel for Metropolitan spoke with Louis Mitchell, Jr., representative of Plaintiffs and obtained Mr. Mitchell's agreement for the filing of a motion for more definitive statement in lieu of an answer. On August 1, 1990, Defendant counsel forwarded Defendant's Motion for More Definitive statement and Brief in Support Thereo to the United States District Clerk for the Northern District of Texas, Fort Worth Division, for filing and forwarded a true and correct copy of said Motion pro se to Plaintiff Henry Mitchel and Louis Mitchell, Jr., as representative. Defendant's Motion for More Definitive Statement and Brief in Support Thereof contained and set forth a Certificate of Conference, certifying the agreement reached between Mr. Louis Mitchell Jr., and counsel for Metropolitan that the Motio would be filed and was not opposed. A true and correct copy of Plaintiffs' Motion for More Definitive Statement and Brief in Support Thereo is attached here as Exhibit "1". Pro se Plainti

Henry Mitchell and Louis Mitchell, Jr., received copy of Metropolitan's Motion for More Definitive Statement on August 2, 1990, as shown by return receipts, copies of which are attached hereto as Exhibit "2".

2

On August 7, 1990, following the agreement between Mr. Louis Mitchell, Jr., representative of Plaintiffs, and counsel for Metropolitan, pro se Plaintiff Henry Mitchell, filed a Motion for Default Judgment and pursuant to Rule 77(c), obtained the Clerk's entry of default judgment. A true and correct copy of Plaintiffs' Motion for Default Judgment and Clerk's Entry of Default are attached hereto as Exhibits "3" and "4", respectively.

On August 10, 1990, notwithstanding proper mailing with correct postage on August 1, 1990, Defendant's Motion for More Definitive Statement and Brief and Support Thereof was received and filed among the papers in this cause by the District Clerk.

3

At the time that Plaintiffs filded their Motion for Default Judgment and sought the Clerk's Entry of Default in this matter, on August 7, 1990, Plaintiffs had entered an agreement with Defendant that the

Defendant would file a motion for more definitive statement in this cause, and Plaintiffs knew that Defendant had forwarded such a motion to the United States District Clerk, Northern District of Texas, Fort worth Division, for filing. Notwithstanding, Plaintiffs sought and obtained, by entry of the Clerk, a default judgment against Metropolitan, without notice or hearing.

4

Pursuant to Rules 55(c) and 60(b), Federal Rule of Civil Procedure, Defendant prays the relief of the Court rescinding and setting aside the default judgment entered in this cause, as being entered b mistake, inadvertence and/or surprise; and by the misrepresentation and the misconduct of Plaintiff. Defendant would show that good cause exists for an order of this Court setting aside default judgment enentered by the Clerk, as Defendant relief on the agreement reached with Plaintiffs' representative that Defendant's Motion for More Definite Statemen would be filed and considered prior to filing an answer herein. Plaintiff should be stopped to deny knowledge of Defendant's Motion for More Definite Statement being presented for filing in this cause. Further, Defendant would show unto

the Court that it has a meritorious defense to the cause of action alleged by Plaintiffs in that Defendant has paid or continues to pay any sum due Plaintiffs as the basis of the agreements entered with or for the benefit of Plaintiffs. Further still, Defendant would show the Plaintiffs will not be prejudice in any way by the granting of Defendant's Motion here presented, as the instant cause has pended for less than sixty (60) days and no party has changed positions or had rights or privileges affected, other than Defendant; and Defendant's harm has been occasioned by the misconduct of Plaintiffs herein.

5

Pursuant to Rule 62(b) and the circumstances and facts here presented, Defendant urges the Court to stay execution of or any proceedings to enforce the default judgment entered by the District Clerk in this cause.

6

Further, Plaintiffs should have sanctions entered against them for the misconduct which resulted in their presenting a motion for default judgment in face of their agreement and knowledge of Defendant's filing a motion for more definitive statement in this

cause. Defendant has or will incur attorneys' fees in preparing and presenting the instant Motion to rescind the Clerk's entry of default judgment, in a reasonable amount of $500.00. The Defendant now seeks the Court's order of sanctions for attorneys' fees and expenses incurred by Defendant herein.

WHEREFORE, PREMISES CONSIDERED, Defendant prays the order of the Court rescinding the Clerk's entry of default judgment in this cause, for attorneys' fees incurred herein in the amount of $500.00, and for such other and furthe relief, both at law and in equity to which your Defendant may show itself justly entitled.

Respectfully submitted,

CHAPMAN & REESE
A Professional Corporation

Carlyle H. Chapman, Jr.
State Bar No. o4134500
Attorney for Defendant
2777 Stemmons Freeway
1200 Stemmons Place
Dallas, Texas 75207
214/638-3600

AFFIDAVIT

STATE OF TEXAS $

COUNTY OF DALLAS $

BEFORE ME, the undersigned authority personally appeared Charles S. Black, a person known to me, and upon Oath deposes as follows:

" I Charles S. Black, am over the age of twenty one(21) and fully competent and capable of stating the matters set forth harein." On July 30,1990, I spoke with Louis Mitchell, Jr. representative of Plaintiff's in the isstant cause and Mr. Mitchell agreed that defendant herein, Metropolitan Life Insurance Company, would file its motion for more Definite statement prior to filing its answer in this cause. On August 1, 1990, I caused to be properly posted and mailed, Defendant's motion for more Definite Statement to plaintiff's amd to the United States District Clerk, Northern District of Texas, Fort Worth, Division. On or about August 4, a990, return receipts evidencing receipt of Defendant's motion for more Definite Statement by Plaintiff's was received in the office of Chapman & Reese."

" I believed that response to plaintiff's

Original Complaint, as authorized under 12,Fed. Rules of Civil procedure, had been made in this cause. On or about September 10, 1990. I discovered that the United States District Clerk, Northern District of Texas, had entered default judgment in this cause against Defendant upon the motion of plaintiff' filed on August 7,1990. At no time have plaintiff;s advised that they had withdrawn agreement to the motion for more definite Statement filed by Defendant."

Defendant Metropolitan has a meritorious defense to the cause of action alleged by Plaintiff's, as it appears that payments have been made or being made pursuant to agreements entered with or in behalf of Plaintiff's herein."

"FURTHER, AFFIANT SAYETH NOT"

_____

Charles S. Black, Jr.

SUBSCRIBED AND SWORN TO BEFORE ME BY THE SAID_____, on this_____12th day of September, 1990. to certify which, witness my hand and seal of office

MY COMMISSION EXPIRES:

5/26/93

_____

NOTARY PUBLIC-State of Texas

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH, DIVISION

HENRY AND DONNA MITCHELL, INDIVIDUALLY, AND AS NEXT FRIEND FOR WILLIAM DEVON MITCHELL, A MINOR	&	CIVIL ACTION NO. CA-4-472-A
VS.	$	
THE MANGELSDORF COMPANY	$	

AMENDED ORDER ON MOTION TO STAY

On November 5, 1990, the Court signed an order denying the petition for stay filed by plaintiff's, Henry and Donna Mitchell, It has come to the Court's attention that Plaintiff's filed two petition for stay, the first on August 8, 1990, and the second on August 14, 1990. neither of said petitions sets forth any ground for stay.

The Court, therefore, orders that each petition for stay be and is hereby denied..

SIGNED THIS 5th DAY OF NOVEMBER, 1990.

JOHN McBRYDE

UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 91-1441

SUMMARY CALENDER

D.C. DOCKET NO. CA4-90-472-A

Henry Mitchell and

Donna Mitchell, Plaintiff'S

Henry Mitchell,

Plaintiff's-Appellant,

VERSUS

METROPOLITAN LIFE INS.CO.

DEFENDANT-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

BEFORE Garwood,Higginbotham and Barkdale,circuit judges.

JUDGMENT

This cause came on to be heard on the record on Appeal and was taken under submission on the file.

On CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause if

affirmed. It is FURTHER ORDERED htat the Appellant's motion to expedite this Appeal is denied as moot.

IT IS FURTHER ORDERED that Plaintiff's-appellant pay to defendant-appellees the costs on appeal to be taxed by the Clerk of this Court.

OCTOBER 28, 1991

ISSUED AS MANDATE--- Dec. 3, 1991

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 91- 1441

SUMMARY CALENDER

HENRY MITCHELL AND

DONNA MITCHELL,

HENRY MITCHELL,

PLAINTIFF'S APPELLANT,

VERSUS

METROPOLITAN LIFE INSURANCE ET AL,

DEFENDANTS-APPELLEES,

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

CA 4 90 472 A

(OCTOBER 28, 1991)

BEFORE GARWOOD,HIGGINBOTHAM, AND BARKDALE,

CIRCUIT JUDGES. PER CURIAM:1

Henry Mitchell, pro-se, Appeals from several orders of the District Court denying his claims relief against three insurance companies for

allegegedly conspiring to deprive his minor son of an annuity. WE AFFIRM.

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1 Local Rule 47.5.1. provides: " The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." pursuant to that Rule, the Court has determined that this opinion sgould not be published.

On June 27,1990, Henry and Donna Mitchell,on behalf of their minor son William Mitchell,filed a pro-se complaint against Metropolitan Life Insurance Company, contending that it had conspired with Texas Medical Liability Trust (TMLT) to deprive their son William of an annuity.TWO days later, on June 29,1990, the Mitchells filed an Amended Complaint", which TMLT and The Mangelsdorf dorf Company, but not Metropolitan, as defendants and which made allegations regarding the same conspiracy. On July 18,1990, Mangelsdorf filed its answers and a motion under Fed.R.Civ.P. 12(b) to dismiss the June 29 amended Complaint for lack of subject matter jurisdiction. On July 19,

1990, the Mitchells filed a motion for leave to file a " First Amended Complaint.".

On August 3,1990, TMLT filed a Rule 12(b) motion to dismiss the June 29 amended complaint for lack of jurisdiction and for failure to state a claim upon which relief could be granted. On August 7, 1990, the Mitchells filed a request for the clerk to enter default against Metropolitan that same day. On August 10,1990, Metropolitan filed a motion, under Fed. R.Civ. P 12(e) for a more definite statement of the claims asserted in the June 27 complaint. Met- Metropolitan's Rule 12(e) motion contained a " Certificate of Conference" stating that the plaintiffs had previously agreed to the filing of the motion.

On August 14,1990, the Mitchells filed a request for the clerk to enter default, and a motion for the Court to grant default judgment, against TMLT: and, despite TMLT's previously filed motion, the clerk entered a default.On August 30, 1990, TMLT moved the court to set aside the entry of default, noting that its Rule 12(b) motion had not been resolved by the court. On September 13, 1990, Metropolitan moved the court to set aside the entry of default against

it, contending that the plaintiffs were estopped from requesting a default because they had agreed to allow Metropolitan to file its Rule 12(e) motion.Further, on September 25,1990, Metropolitan moved for a dismissal, contending that the Mitchells had voluntarily dismissed it by the filing the superseding June 29 amended complaint which had not named Metropolitan as a defendant.

On November 5, 1990, the district court granted the Mitchells' July 19 motion for leave to file their "First Amended Original Complaint". which was filed that same day. Noting that the only entity named as a defendant in that complaint was Mangelsdorf, the court ordered that the style of the action thereafter be"Henry and Donna Mitchell, Individually and as Next Friend for William Devon Mitchell, a minor, plaintiffs Vs. The Mangelsdorf Company, defendant.

On November 7, 1990, the district court entered several orders disposing of outstanding motions. among other things,itI1) denied Metropolitan's September 25 motion to dismiss as "inappropriate", finding that it was no longer a party to the action because the filing of the June 29 Amended Complaint in which it was not named as

a defendant served as a voluntary dismissal:(2) denied the Mitchells' motion for a default judgment against Metropolitan, and set aside the clerk entry of default, on the same grounds:(3) granted, TMLT's motion to set aside the clerk entry of default against it due to the timely filing of its Rule 12(b) motion: and (4) denied the Mitchells' motion for a default judgment against TMLT.

That same day, the district court also ruled that, because the November 5 amended complaint named only Mangelsdorf as a defendant, the Mitchell had " effectively voluntary dismissed (TMLT) from this action." and, with respect to Mangelsdorf, theonly remaining defendant, the court granted its July 18 motion to dismiss for lack of subject matter jurisdiction, finding that the plaintiffs had not met their burden to adequately allege and invoke Federal jurisdiction.2

The Mitchells filed a notice of Appeal on November 16, 1990, However, because the district court had not entered a final judgment under Fed.R.Civ.P. 58, this court dismissed the appeal for lack of jurisdiction.Therefore, on January 23,1991, the district court entered a

final judgment,dismissing all of the claims.

The Mitchells filed another notice of Appeal on

Following the conclusion of their suit in the district court, the Mitchells' filed suit against the district judge and law Clerk, contending that the two had maliciously conspired to set aside the default judgments obtained in this matter. The Mitchells' conspiracy claims were dismissed pursuant to Fed.R. Civ. P. 12(b)(6) on grounds that the district judge and his law Clerk were absolutely immune from from damage claims arising out of acts performed in the exercise of their respective judicial functions.This Court Affirmed that ruling in Mitchell V. McBryde, No. 91-1171, slip op. at 100(5th Cir. Oct.9,1991).

February 6, 1991. On February 15, 1991,however, the district court, sua sponte, requested authorization from this Court to amend the judgment under Fed.R.Civ.P. 60(b).accordingly, this Court remanded; and on March 26,1991,the district court entered an amended final judgment which dismissed all claims of the Mitchells without prejudice. On April 15,1991, Henry Mitchell timely appealed.3

Mitchell appears to contend that the district court erred in (1) ruling that Metropolitan and TMLT had been voluntary dismissed by the filing of superseding amended complaint; and(2) dismissing the complaint against the remianing defendant, Mangelsdorf, for lack of subject matter jurisdiction, because these ruling involve application of law, they are reviewed de novo. **YNCLAN YNCLAN V. DEPARTMENT of the air FORCE, NO. 89-5522, slip OP.AT 105(5th Cir. Sept.23, 1991).**

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3 Although the April 15 notice of appeal was also purportedly filed on behalf of Donna Mitchell, only Henry Mitchell signed the document. In an April 25, 1991 letter, the Court clerk advised Donna Mitchell that she was required to notify the Court, on or before May 6,1991, if she intended to appeal. Her notification that she did wish to remain as a party on appeal was received by the Court on May 7--- one day late. Therefore, on June 5, 1991, this Court dismissed the appeal of Donna Mitchell for lack of jurisdiction. see **MIKESKA V. COLLINS,928F.2d.126,126-27(5th**

CIR. 1991) (an appellant listed in a multi-party peo-se notice of appeal who fails to sign the notice must notify this Court in writing of an intent to appeal within the time prescribed in Fed.R. app. P. 4(a)(3). Donna Mitchell's subsequent motion for reinstatement as a plaintiff's, which this Court construed as a motion for reconsideration, was denied on July 22,1991.The dismissal of Donna Mitchell's appeal had no effect on the appeal of Henry Mitchell.

It is well-settled that "an amended complaint ordinarily supersedes the original and renders it of no legal effect, unless the amended complaint specifically refers to or adopts thw earlier pleading." **BOELENS V. REDMAN HOMES,INC. 759 F. 2d.504,508(5th Cir.1985) see also Clark v. tarrant county, texas,798 F.2d.736,740.(5th Cir. 1986): WILSON V. FIRST HOUSTON INVESTMENT CORP., 566 F.2d. 1235,1237-38(5th Cir. 1978), vacated on other grounds, 444 U.S. 959(1979).**The prior pleading is in effect withdrawn as to all matters not restated in the amended pleading, and be come(of no further force or authority)(**NISBET V. VAN TUYL, 224 F. 2d.66,71(7th Cir.1955).**

As noted, on June 29,1990, within the time

allowed by Fed. R..Civ. P. 15(a) for amending a pleading as a matter of course, the Mitchells filed an amended complaint, which named Mangelsdorf and TMLT as defendants, but which, unlike the original complaint,did not name Metropolitan. Deleting a defendant in an amended complaint is in effect a dismissal as to that defendant.see **ZIMMERMAN V. EMMONS 225 F.2d. 97,98 n.2(9th Cir.1955), cert.denied, 350 U.S. 932(1956), because the original complaint was no longer of any legal effect, the district court correctly ruled that Metropolitan was no longer a party to the action.**

On November 5, 1990, the district court granted leave for the filing of the Mitchells' FIRST AMENDED ORIGINAL COMPLAINT"which named only the Mangelsdorf a defendant to the action.because this latest amended complaint also deleted TMLT as a defendant, the district court correctly found it was no lonqer a party to the proceedings, moreover, the effect of these dismissals precludes Mitchell's contentions on appeal that the district court erred in denying his motion for default judgment against Metropolitan and TMLT. Needless to say, a default judgment can-

not be obtained against an entity not a party to the suit.

B.

Because" Federal courts are courts of limited jurisdiction.... parties seeking to invoke the jurisdiction of a Federal court have the burden of proving that jurisdiction exists."**HUMMEL V.TOWNSEND, 883 F. 2d. 367,369(5th Cir. 1989) (citing aetna casualty 7 sur. co. v. HILLMAN,796 F.2d 770,775(5ht Cir.1986). Furthermore, as stated in boelens, if an " amended complaint... neither makes reference to nor adopts any portion of the originalcomplaint, jurisdiction must be judged soley on the allegations of the amended complaint." 759 F.2d at 508. The Mitchells' last filed amended complaint neither reference nor adopts any portion of their First two complaints. Therefore, in determining whether ther district court properly ruled that it lacked subject matter jurisdiction over the Mitchells' claims, we must look soley to the November 5 amended complaint. It contained the following statement concerning jurisdiction:**

JURISDICTION

The United States (sic) District Court has jurisdiction on (sic) the parties to this action because the matter in controversly exceeds ten thousand Dollars ($ 10.000.)(sic) jurisdiction is founded upon diversity of Citizenship and the amount in controversly.

The United States District Court has jurisdiction on (sic) the parties to this action because the alleged actions occurred in Tarrant County, Texas, which is in the Northern District of Texas.

Although this is an attempt to invoke jurisdiction through diversity of Citizenship under 28 U.S.C § 1332, the Amended complaint also states that plaintiff's reside in Tarrant County, Texas, and that Mangelsdorf is"(i)ncorporated and (its) principle (sisc) place of business is in Dallas County, Texas", because the Mitchells have alleged that both part parties are Citizens Citizens of Texas of Texas, diversity jurisdiction, obviously, does not exist. 28 U.S.C. § 1332(a) and(c)(1). Furthermore, the November 5 Amended complaint alleges no grounds upon which Federal jurisdiction could exist. 28 U.S.C.§ 1331. In this

light, the district court properly dismissed the complaint for lack of jurisdiction.

for the foregoing reasons, the judgment is

AFFIRMED.[4]

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4 accordingly, mitchell's motion to expedite this appeal is denied as moot.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 91-1441

SUMMARY CALENDER

D.C. DOCKET NO. CA4-90-472-A

Henry Mitchell and

Donna Mitchell, Plaintiff'S

Henry Mitchell,

Plaintiff's-Appellant,

VERSUS

METROPOLITAN LIFE INS.CO.

DEFENDANT-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

BEFORE Garwood,Higginbotham and Barkdale,circuit judges.

JUDGMENT

This cause came on to be heard on the record on Appeal and was taken under submission on the file.

On CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause if

affirmed. It is FURTHER ORDERED htat the Appellant's motion to expedite this Appeal is denied as moot.

IT IS FURTHER ORDERED that Plaintiff's-appellant pay to defendant-appellees the costs on appeal to be taxed by the Clerk of this Court.

OCTOBER 28, 1991

ISSUED AS MANDATE--- Dec. 3, 1991

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

DECEMBER 20, 1991

Mr. Henry Mitchell

P.O.BOX 19172

FORT WORTH,TX. 76119

NO. 91-1441- MITCHELLV.METROPOLIATAN

Life ins.co.(D.C. #CA-4-90-472-A

MANDATE RECALLED AND STAYED TO AND INCLUDING

FEBRUARY 17,1992.(see Enclosed Order)

The Court has this day granted the recalled and and stay of the mandate to the date shown above. If during the period of the stay there is filed with the Clerk of this Court a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for Writ in that Court, the stay shall continue until " disposition by the Supreme Court. Upon the filing of a copy of an Order of the Supreme Court denying the petition for Writ of Certiorari. the mandate shall issue immediate-

ly under Rule 41. FRAP.

Under revised Rule 19.1 of the Supreme Court. effective June 30,1980, a request to certify the record prior to action by the Supreme Court on the petition for Certiorari should not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by that Court. A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

By copy of this letter to the Clerk of the District Court, We request that he return the opinion and judgment previously issued as mandate.

VERY TRULY YOURS,

_____

Gilbert F. Ganucheau,Clerk

By:_____

Deputy Clerk/Robert F.Flaig

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 91-1441

HENRY MITCHELL AND

DONNA MITCHELL, PLAINTIFF'S

HENRY MITCHELL,

PLAINTIFF'S APPELLANT,

VERSUS

METROPOLITAN LIFE INS.

CO. ET AL.

DEFENDANTS_APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING

(NOVEMBER 21, 1991)

BEFORE GARWOOD, HIGGINBOTHAM AND BARKSDALE,

CIRCUIT JUDGES.

R. CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and is hereby denied.

(11)

CONCLUSION

The Statues and Laws that governs party's that failed to defend within the required time and the mandate that allows a given time must be upheld in light of the allege agreement that did not take place, for the Affidavit filed by the defendant, MetLife would show this Court that deception by the defendant which deceived the lower Courts into thinking that payments had been made pursuant to said agreement, for the defendant did not filed their answers or defend the Complaint pursuant to said Rules and by way of deception was a way of taking advantage of the pro-se litigant.

The Petitioners, Henry Mitchell, et al prays this Court to grant the Writ of Certiorari reverse the decision by the lower Court because of error's made and render default judgment in favor of Plaintiff's.,Plaintiff's contend that the lower Court erred when it dismiss Donna Mitchell, because of being one day late for the documents was mailed on May 2,1991, (thursday) and should have delivered to the Court over the weekend.

Henry Mitchell

Henry mitchell